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ALEXANDER L. STEVAS,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC.,
Petitioner,

v.

CITY OF BOULDER, COLORADO,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Where the state constitution grants autonomy over local matters to a home rule city, does the City Council's valid exercise of those powers to enact an Ordinance halting cable T.V. construction within the City limits for 90 days constitute an act of government which is beyond antitrust attack?

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COUNTERSTATEMENT OF THE CASE

This case arises from Community Communications Company's ("CCC") antitrust challenge to legislative acts of the City of Boulder, Colorado, pursuant to its powers of self-government guaranteed by the Colorado Constitution. Specifically at issue in this appeal are two City ordinances[1] which amended CCC's existing cable T.V. permit to halt new cable construction for ninety days so that the City could proceed with a request for proposals from additional operators.

CCC is a wholly-owned subsidiary of Telecommunications, Inc. ("TCI"), the third largest cable T.V. operator in the United States with over 130 monopoly cable systems nationwide.[2] The City adopted the moratorium Ordinance because CCC's newly-announced "wiring" of all of Boulder threatened to foreclose additional cable T.V. operators from entering the Boulder market for the foreseeable future.

CCC brought this antitrust action to enjoin implementation of the City moratorium Ordinance. The trial court found that the Ordinance violated the Sherman Act and

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[1] Ordinance Nos. 4472 and 4473 are reprinted in the Appendix to the Petition ("App. Pet.") at A-55 to A-65. These two ordinances are hereinafter referred to collectively as the challenged Ordinance.

[2] Boulder Ex. E-1, Appendix to CCC Proposal to Boulder (offered March 6 Tr. 2; received March 6 Tr. 6). Testimony at the hearing on the motion for preliminary injunction is referred to by the witness name, the date, and the page of the hearing transcript (*e.g.*, "Sparkman, March 4 Tr. ____"); deposition testimony is referred to by witness name and page of deposition transcript (*e.g.*, "Westdyke Dep. ____"); hearing exhibits are referred to as "Boulder Ex. ____"; the Joint Appendix is referred to as "J.A. ____"; the Petitioner's Brief is referred to as "P. Br. ____"; and the *amici curiae* brief of Colorado and other states is referred to as "A.G. Br. ____."

enjoined the City from taking "unilateral action" to restrict CCC's cable T.V. business. The Court of Appeals for the Tenth Circuit reversed, holding that the City's action was not subject to antitrust attack under the state action doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943).

Background

Respondent, the City of Boulder, Colorado, is a "home rule" city of approximately 77,000 people organized as a locally autonomous governmental unit under Article XX, Section 6 of the Colorado Constitution (App. Pet. A-47 to A-49), which confers on the City "the full right of self-government in both local and municipal matters." Under its charter, all legislative powers of the City are exercised by a nine-member City Council elected by Boulder's citizens. BOULDER, COLO., CHARTER §§ 5, 11 (1965 rev. ed.). In recent years the Boulder City Council has convened at least weekly to consider local affairs and to take legislative action on a variety of local matters.[3] In carrying out these local governmental functions, the City issues many different types of licenses, permits and franchises.

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[3] These include local regulation of: intoxicating liquors (BOULDER, COLO., CODE ch. 3 (rev. ed. 1965)), animals and fowl (*id.* ch. 4), buildings (*id.* ch. 5), storm drainage and flood control (*id.* ch. 8), the fire department (*id.* ch. 10), food and food establishments (*id.* ch. 12), gambling (*id.* ch. 13), refuse and weeds (*id.* ch. 14), local improvements (*id.* ch. 17), milk (*id.* ch. 18), minors (*id.* ch. 19), motor vehicles and local traffic (*id.* ch. 20), parks-recreation-open space (*id.* ch. 22), plumbing and mechanical codes (*id.* ch. 23), poles and wires (*id.* ch. 24), police (*id.* ch. 25), public amusements (*id.* ch. 26), local railroad traffic control (*id.* ch. 28), rodent control (*id.* ch. 29), junk dealers (*id.* ch. 30), streets and sidewalks (*id.* ch. 31), subdivisions (*id.* ch. 32), taxicabs (*id.* ch. 33), trees, plants and shrubs (*id.* ch. 34), water and sewers (*id.* ch. 35), weapons (*id.* ch. 36), zoning (*id.* ch. 37), mobile homes (*id.* ch. 38), local airports (*id.* ch. 39), local sales

Pursuant to a 1964 City permit, CCC operates the only cable T.V. system in the City of Boulder. From 1966 to May, 1979, this system served about 10% of the City's residents. In 1979, CCC announced its plans to "wire" the balance of the City (Boulder Ex. K; offered March 4 Tr. 41; received March 4 Tr. 42) and another cable T.V. company, Boulder Communications Company ("BCC"), approached the City about building a system in Boulder. (J.A. 12-14).

In response to these developments, the City Council hired a cable T.V. consultant (Sample, March 4 Tr. 181) and began a five-month study to determine the most effective way to obtain "the best state-of-the-art" cable T.V. services for its citizens. (Correll Dep. 54). CCC's expansion plans (Boulder Ex. M; offered March 4 Tr. 83; received March 4 Tr. 84) did not include certain cable services — such as automated home fire and burglar alarms, two-way transmission capability and sufficient channel capacity for future development — and the Council determined that it should conduct a supplemental request for bids to see if such services could be obtained from additional operators. (App. Pet. A-55 to A-56, 6th ¶).

The transcripts of the City Council's four lengthy meetings demonstrate its desire that competition help the City achieve the goal of "state-of-the-art" cable T.V.

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and use taxes (*id.* ch. 40), electrical building code (*id.* ch. 41), pawnbrokers (*id.* ch. 42), traffic engineering (*id.* ch. 43), ambulance service (*id.* ch. 44), housing code (*id.* ch. 45), public improvements and facilities (*id.* ch. 46), public accommodations tax (*id.* ch. 47), sign code (*id.* ch. 48), tax refund program (*id.* ch. 49), an admissions tax (*id.* ch. 50) and a historic preservation code (*id.* ch. 51).

(J.A. 31).[4] The Council was aware, however, that cable T.V. systems tended to operate as monopolies and that CCC enjoyed a significant advantage over any prospective competitors because it was already in place in the City, had a substantial headstart in "wiring," and had already taken steps to expand.[5] The City Council feared that these factors would effectively preclude the entry of additional cable T.V. operators into the Boulder market.[6]

During the fall of 1979, while the City Council was deliberating, CCC accelerated its construction schedule to capture more of the market before competitors could successfully enter. (Westdyke, March 4 Tr. 37). "The purpose of CCC's continued installation was to blanket the market before other firms had an opportunity to compete."[7] On December 1, 1979, CCC's President told a

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[4] CCC's Statement of the Case (P. Br. 2-16) offers an array of factually unsupported contentions and marked overstatement. For example, CCC characterizes the City's purpose (P. Br. 6, 1st ¶) as opposed to "open market competition" and as seeking to replace CCC with a single, more "amenable" operator. CCC cites neither the Joint Appendix nor the record as support for these contentions and, in fact, the deliberations of the City Council demonstrate that they are unsupportable. *See e.g.*, Boulder Ex. X at 14, 18, 19, 21, 29, 32-33, 37 (offered March 4 Tr. 171; received March 4 Tr. 172); Boulder Ex. Y at 22, 29, 44 (offered March 4 Tr. 171; received March 4 Tr. 172); Boulder Ex. A-1 at 62-63, 73 (offered March 6 Tr. 5; received March 6 Tr. 5).

[5] *See, e.g.*, Boulder Ex. X at 13-15, 19, 22-24, 37-38, 41-43; Boulder Ex. Y at 20-21, 26-30; Boulder Ex. Z at 5-6, 11, 16, 23-25 (offered March 6 Tr. 2; received March 6 Tr. 5).

[6] "I see an excellent opportunity for them to circumvent anybody else from coming in by just getting out and running some lines." (Council Member Boland, Boulder Ex. X at 14).

[7] March 3, 1980 Memorandum of The Colorado Attorney General As *Amicus Curiae* In Opposition To Plaintiff's Motion For Temporary Restraining Order 2.

City official that if Boulder tried to get other cable T.V. operators to accept City permits, "it might make [CCC] build a little faster. They didn't mind. *They would like to be the only show in town.*" (J.A. 80; emphasis added).

Faced with this situation, on December 18, 1979, the City Council enacted the challenged Ordinance amending CCC's permit to halt CCC's new cable T.V. construc- for ninety days.[8] On January 11, 1980, the City requested proposals from over 50 cable operators (Westdyke, March 4 Tr. 43) and placed advertisements in the *Wall Street Journal* (Varnes, March 6 Tr. 20) in order to determine whether additional services were available from other operators. (Correll Dep. 44, 55; Sample, March 4 Tr. 184). The City requested proposals for "fire and burglar alarm services, traffic control, home shopping [and] remote medical diagnosis." (Boulder Ex. A, Form 3D; offered March 6 Tr. 2; received March 6 Tr. 3). Three cable operators (other than CCC) responded; two of these committed to provide several of the cable services which CCC had refused.[9]

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[8] [T]he long range purpose and hoped-for effect of the moratorium was to break TCI's monopoly of the Boulder cable t.v. market, which is undoubtedly the reason TCI has so strenuously opposed the moratorium all along.

April 22, 1980 *Amicus Curiae* Brief of the Colorado Attorney General 30; *see also id.* at 5; May 12, 1980 *Amicus Curiae* Reply Brief of the Colorado Attorney General 16-17.

[9] *E.g.*, burglar and fire alarms, built-in two-way capability throughout the system and more than 50 channels (as compared with CCC's offer of 35 channels). Boulder Ex. B-1 at 5-8 (offered March 6 Tr. 6; received March 6 Tr. 5); Boulder Ex. C-1 at 3c-3o (offered March 6 Tr. 6; received March 6 Tr. 6). CCC declined to commit to these services. Boulder Ex. E-1 at 27.

The Litigation

On January 15, 1980, CCC brought this antitrust action against the City to overturn the moratorium Ordinance. Although CCC claimed that in adopting the Ordinance the City had conspired with BCC, the trial court found that the "evidence is insufficient to establish a probability that the plaintiff will prevail on this claim." *Community Communications Co.* v. *City of Boulder,* 485 F.Supp. 1035, 1038 (D. Colo. 1980) (App. Pet. A-36, A-40). Indeed, the preliminary injunction appealed from enjoined the City from taking only "unilateral" action to restrict CCC's cable business. (App. Pet. A-46).

Evidence adduced at the hearing on CCC's motion for a preliminary injunction demonstrated that cable T.V. tends to be a monopoly service in each locality[10] and that CCC's uninterrupted "wiring" of Boulder threatened to make it "the only show in town."[11]

Despite finding no "conspiracy," and without evaluating the challenged Ordinance under the Rule of Reason,

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[10] Virtually all of the nation's cable systems enjoy *de facto* monopolies; only about six of approximately 6000 systems involve head-to-head competition. (J.A. 77-78; Pilnick, March 5 Tr. 38-39, 129, 132, 151; Sample, March 4 Tr. 218; Westdyke Dep. 34-39). The testimony repeatedly characterized municipal cable T.V. service as a monopoly (Pilnick, March 5 Tr. 96, 129, 132, 151, 166-67, 181, and 187) and emphasized that:

> If it was too far gone, if the first company had so much of an advantage either in construction itself, or being ready for construction, then you could issue a thousand permits, and of the thousand the remaining 999 permittees would really have no practical chance of building an operating system.

(J.A. 79; *see also* Westdyke, March 4 Tr. 96, 100).

[11] Market penetration rates are not high enough to cover the capital and operating costs of two directly competing systems. (J.A. 76-77; Pilnick, March 5 Tr. 40, 54-55). An additional barrier to competition

on March 17, 1980, the trial court preliminarily enjoined enforcement of the Ordinance as a violation of the Sherman Act:

> The [City's] motivation may be to foster competition in the long run, but the direct and immediate effect is a restraint of trade and an artificial and unreasonable geographical market allocation.

(App. Pet. A-43). The trial court also held that the City's action was not immune from antitrust challenge under *Parker* v. *Brown*, 317 U.S. 341 (1943). On May 28, 1980, the court of appeals reversed the preliminary injunction, holding that the challenged City Ordinance was immune from antitrust liability under *Parker. Community Communications Co.* v. *City of Boulder*, 630 F.2d 704 (10th Cir. 1980) (App. Pet. A-1).

Following the court of appeals' decision, CCC renewed construction in Boulder and the other companies that had submitted bids refused to accept a City permit for any area where CCC was ready to "wire". (Boulder Ex. I-2d at 1098-1102, 1110-11). On recommendation of the Antitrust Section of the Colorado Attorney General's office (Boulder Ex. I-2d at 1199-1201), the Council adopted Ordinance No. 4515 (J.A. 69-75) dividing the City into cable T.V. districts and assigning one district to CCC, which it admits is economically viable. *See* Stipulation of Counsel filed July 21, 1980. The Council, agreeing with the Colorado Attorney General that direct competition was not possible at the present time, adopted the

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is the cost associated with the rearrangement of lines on utility poles when a second cable is added and, in areas where cable must be laid underground, the extra costs associated with digging up roads and homeowners' property after the first cable is in place, including accidental cutting of lines and resultant repairs. (*Id.* at 33-37; Sample, March 4 Tr. 226; Olson, March 6 Tr. 58-63).

districting system in order to provide Boulder's citizens with better cable service in several districts and with some of the benefits of indirect competition. (J.A. 70-71).[12]

SUMMARY OF THE ARGUMENT

1. Boulder's enactment of the challenged Ordinance was an exercise of its home rule power, which gives the City "'*every power* theretofore possessed by the legislature . . . in local and municipal affairs.'" *Denver Urban Renewal Authority* v. *Byrne*, 9 COLO. LAW. 2720, 2722 (Colo. Sup. Ct. Oct. 27, 1980). These powers of self-government are guaranteed to Boulder and its citizens by an amendment to the Colorado Constitution which was adopted by referendum for the express purpose of freeing cities from the need to obtain a specific, detailed authorization from the General Assembly for each municipal act.

2. The fact that the state's legislative authority over local matters is exercised by a constitutionally authorized home rule city, rather than by the General Assembly, does not diminish the applicability of the state action doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943). Moreover, even under *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), the Ordinance challenged here is not subject to antitrust attack. It is not necessary that a state's political subdivision "be able to point to a

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[12] On August 25, 1980, the trial court enjoined the City from enforcing Ordinance No. 4515 on Sherman Act and first amendment grounds. The City appealed; the matter has been briefed and argued before the Tenth Circuit; and on May 15, 1981, the court of appeals *sua sponte* enjoined CCC from further cable T.V. construction pending appeal. Boulder Ex. I-2d, referred to above, was offered and received in evidence at August 21 Tr. 6, 74.

specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit." 435 U.S. at 415. An adequate state mandate for such municipal acts exists when the power and authority conferred on the city demonstrate that the challenged actions were "comprehended" within the city's authority or "contemplated" in the grant of its powers. Boulder's self-governing power under the Colorado Constitution amply satisfies this requirement.

Petitioner here attempts to transform the *Lafayette* test into a wooden rule: a home rule city's governmental authorization must be renewed by the General Assembly for each "specific *kind* of action in a *particular* area." (P. Br. 35). Such a "ticket stamping" requirement for Colorado home rule cities is not necessary under *City of Lafayette* and would displace the decision of the people of Colorado to allocate the state's legislative power over local matters to the elected representatives of the local citizens. If the *City of Lafayette* test can be so interpreted, however, then it must be clarified so that Colorado's home rule cities are not forced to abandon their local autonomy in order to qualify for *Parker* immunity. Such clarification would be in keeping with the history and purpose of the Sherman Act and with the principles of Federalism which underlie our system of government.

3. Congress never intended the Sherman Act to apply to legislative acts of cities, such as the Ordinance challenged here. The antitrust statutes were intended to reach "these great trusts, these great corporations, these large moneyed institutions" (21 CONG. REC. 2562 (1890)), and not to reach "political activity." *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). Moreover, the substantive antitrust law is itself designed to apply to private restraints of trade and thus balances the procompetitive

and anticompetitive effects of the challenged restraint. Legislative acts designed to achieve important local police power objectives necessarily cause some degree of disruption of free market forces, and cannot, in the usual case, be justified by any discernible procompetitive impact. For example, local governments may restrain the minimum size of building lots, not because such a restraint will promote competition in that market, but in order to assure that the local community is more spacious.

In addition, such actions taken by home rule cities cannot, by the very nature of constitutional home rule powers, be based upon specific, detailed authorizations from the state legislature. Thus, the adoption of Petitioner's test requiring a specific, detailed legislative authorization for each particular act by a home rule city would turn every disappointed applicant for a city permit into a potential federal court antitrust plaintiff; produce bad antitrust law; and chill the development of legitimate local legislative choices because of the *in terrorem* effect of the threat of protracted antitrust litigation (including the significant, non-recoverable expenses of defense, as well as the risk of paying treble damages and attorneys' fees from the public taxes).

4. On a more basic level, a judicial interpretation requiring home rule cities to go back to the state legislature for a specific, detailed authorization for each local legislative act with any anticompetitive consequences, would interfere with one of the central attributes of state sovereignty — the allocation and structuring of the state's legislative power. Moreover, the direct application of the Sherman Act to cities' legislative enactments would strike at the heart of the political function of local, self-governing subdivisions of the state. *See, e.g., National League of Cities* v. *Usery,* 426 U.S. 833 (1976).

Such federal court review, under the aegis of the antitrust laws, of every legislative enactment of city government would reinstate the same kind of judicial economic second-guessing which the country endured for years under the theory of substantive due process.

For all these reasons, the judgment of the court of appeals should be affirmed.

ARGUMENT

I. UNDER THE DECISIONS OF THIS COURT, THE GOVERNMENTAL ACTS OF COLORADO CITIES TAKEN PURSUANT TO CONSTITUTIONALLY GUARANTEED HOME RULE POWERS ARE NOT SUBJECT TO ANTITRUST ATTACK.

Constitutionally guaranteed local autonomy for home rule cities is deeply embedded in Colorado's system of government. The basic premise of home rule is that democracy works best with respect to local matters when it is in the hands of local citizens. Such autonomy is particularly appropriate in the case of cable T.V., which poses essentially local problems.

In these circumstances, the City's cable T.V. moratorium Ordinance is an "act of government" by the City, acting as the state on local matters, and therefore is not subject to antitrust attack under the doctrine of *Parker* v. *Brown,* 317 U.S. 341, 352 (1943). Moreover, the state constitution's guarantee of local autonomy in such matters fulfills the requirement of *City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S. 389, 413 (1978), that the City's act be "comprehended within the powers granted" to the City or "contemplated" in the grant of its authorities. 435 U.S. at 394, 415. In order to appreciate the manner in which the challenged Ordinance is "comprehended within the powers granted" to the city, we must begin by examining the purpose of

municipal home rule and its role in our system of government.

A. The Ordinance Challenged Here Is A Legislative Enactment Of Boulder's Home Rule Government Acting As The State With Respect To Local Matters.

From the earliest times of the Republic, cities have exercised a substantial degree of local autonomy. In 1835 de Tocqueville observed that:

> [Townships] are independent in all that concerns themselves alone; and amongst the inhabitants of New England, I believe that *not a man is to be found who would acknowledge that the state has any right to interfere in their town affairs.*

A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 38 (Hacker ed. 1964) (emphasis added). As the country grew and urbanized, however, local autonomy gave way to control by the state legislatures.

> It was during the second half of the nineteenth century that state legislatures across the country established by usage the power which, from the beginning, they had in theory. As urban areas increased in number and population, fed by immigrants from the rural areas and abroad, governmental activity increased. . . . Increasingly, intervention by the state legislature was sought. . . . Legislation descended into regulation of the minutest details of municipal government.

Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts,* 48 MINN. L. REV. 643, 647 (1964) (footnotes omitted) (hereinafter "*Sandalow*").

In Colorado, the General Assembly's exercise of control over local matters in the City of Denver proved particularly troublesome. Denver's Charter became the subject of "constant tinkering" by the General Assembly. J.

RUSH, THE CITY-COUNTY CONSOLIDATED 143 (1941) (hereinafter "*Rush*"). "Specific legislative approval was necessary for every power which [the City] wished to exercise." Hornbein, *Denver's Struggle for Home Rule,* 48 THE COLORADO MAGAZINE 337, 346 (1971) (hereinafter "*Hornbein*").

In 1889 and 1891, the Colorado General Assembly adopted "special" legislation creating two Denver Boards which gave the Governor control over all of Denver's local public works and local fire and police services. See Klemme, *The Powers of Home Rule Cities in Colorado,* 36 U. COLO. L. REV. 321, 324 (1964) (hereinafter "*Klemme*"). With the establishment of these two boards, "Denver came entirely within the shadow of the statehouse." *Hornbein* at 338.[13]

For a decade or more a "bitter struggle" between the General Assembly and the City of Denver ensued. Johnson, *Municipal Home-Rule in Colorado: Self-Determination* v. *State Supremacy,* 37 DICTA 240, 245 (1960) (hereinafter "*Johnson*"). In the words of a contemporary observer:

> The City of Denver had . . . been reduced to a position of political serfdom. So intolerable had conditions become that its people started a strong agitation for "Home Rule."

Rush at 329-30.

At about the same time, similar home rule movements sprang up around the country:

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[13] "Another cause of irritation was the situation as to the public schools." *Rush* at 330. In the 1890's, Denver included six school districts which were separately financed and administered. The City had repeatedly been denied authorization by the state legislature to consolidate these separate schools for greater efficiency and uniformity of education. *Id.*

> Cities are ruled by legislatures from the State capital; they are governed, that is, by men from the country who know nothing of city problems or city life, and have indeed no real conception of just what cities need. In league with them . . . are the public utility corporations and political machines. *The first requisite, therefore, for municipal reform, is home rule.*[14]

Soon the popular demand for local autonomy became widespread: *"Everywhere the first battle was the struggle for 'home rule.'"*[15]

> In due course, a reaction set in. Local governments — more accurately, some of their citizens — sought, and frequently developed sufficient political strength to obtain, constitutional recognition of *areas of assured local autonomy.*

Sandalow at 648 (emphasis added). This is precisely what happened in Colorado:

> The efforts of some of Denver's citizens to alleviate the city's problems led eventually to the home rule movement, culminating in the adoption in 1902 of article XX. Thus, as seems generally true in other states, *home rule was adopted in Colorado for the purpose of relieving municipalities from their dependence on legislative action for their form of organization and powers and from the resultant interference in municipal affairs such dependence made possible.*

Klemme at 324 (footnotes omitted; emphasis added); *see also Johnson* at 240; *Hornbein* at 349; *Rush* at 331-32.

By state-wide referendum on November 4, 1902, the people of Colorado voted to add a new Article XX to

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[14] *Letters of Brand Whitlock* (Mayor of Toledo 1904-1913), in 2 S. MORISON, H. COMMAGER & W. LEUCHTENBURG, THE GROWTH OF THE AMERICAN REPUBLIC 289 (6th ed. 1969).

[15] H. FAULKNER, POLITICS, REFORM AND EXPANSION (1890-1900) 27 (1st ed. 1959).

their Constitution to assure local autonomy for the City of Denver. In 1912, another state-wide referendum broadened Article XX so that other qualifying cities and towns could elect to be governed by home rule. On October 30, 1917, the people of the City of Boulder elected home rule status.

Several other states also adopted a form of municipal home rule and, although the nature and scope of the powers conferred differ significantly (see discussion *infra* at 19 n.19), the underlying purpose is the same:

> (1) to stop legislative interference with affairs purely local, and (2) to foster and develop among citizens a full sense of civic duty and responsibility. Local electors should have better knowledge of, and hence should be more competent to manage, local matters, and moreover, state legislatures are neither interested in nor informed as to local conditions.

2 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 9.08 (3d ed. 1979); *see also,* C. PATTON, THE BATTLE FOR MUNICIPAL REFORM 16-17 (1969).

In Colorado the purpose of freeing home rule cities from the General Assembly's interference is stated in the Colorado Constitution itself:

> *Such charter and the ordinances* made pursuant thereto in such [local and municipal] matters *shall supersede* within the territorial limits and other jurisdiction of said city or town *any law of the State in conflict therewith.*
>
> . . . .
>
> *It is the intention of this article to grant and confirm to the people of all municipalities* coming within its provisions *the full right of self-government in both local and municipal matters* and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or

> power essential or proper to the full exercise of such right.

COLO. CONST. art. XX, § 6 (emphasis added).

The Colorado Supreme Court has consistently interpreted this provision in keeping with its history as guaranteeing the independent authority of home rule cities over local matters:

> On such questions of local concern, a home rule city is vested with the plenary power of self-government . . . .
>
> > "In numerous opinions handed down by this court extended over a period of fifty years, it has been made perfectly clear that when the people adopted Article XX they conferred *every power* theretofore possessed by the legislature to authorize municipalities to function in local and municipal affairs. (Emphasis in original.) . . ."
>
> *Thus, by virtue of Article XX, a home rule city is not inferior to the General Assembly concerning its local and municipal affairs.*

Denver Urban Renewal Authority v. *Byrne,* 9 COLO. LAW. 2720, 2722 (Colo. Sup. Ct. Oct. 27, 1980) (citation omitted; emphasis added); *Four-County Metro. Capital Improvement Dist.* v. *Board of County Commissioners,* 149 Colo. 284, 294, 369 P.2d 67, 72 (1962).

In the present action, the court of appeals properly determined that Boulder's Ordinance halting new cable T.V. construction within the City's boundaries was a matter of "local concern" under the City's home rule powers:

> The franchise of the plaintiff cable T.V. company is necessarily limited to service within the City of Boulder. The services provided are limited to City

> residents through the use of City streets and ways. The matter or subject is a local one.

(App. Pet. A-6).[16]

Cable T.V. operates in the public right-of-way, and thus has always been subject to local regulation through franchises and permits. *See United States* v. *Southwestern Cable Co.*, 392 U.S. 159, 163 & n.15 (1968). In Colorado, home rule cities have always exercised regulatory control over local cable T.V. services within their borders.[17] In all these years Colorado has never attempted to regulate cable T.V. at the state level.

At the national level, the Federal Communications Commission ("FCC") has encouraged municipal regulation of the local incidents of cable T.V.:

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[16] The court of appeals relied on the Colorado Supreme Court's decision in Manor Vail Condominium Ass'n v. Town of Vail, ___ Colo. ___, 604 P.2d 1168 (1980), holding that Vail's regulation of cable T.V. rates was "rationally related to a legitimate state interest" and did not violate the equal protection clause. *Id.* at 1171. The local government involved in *Manor Vail* was a home rule city; the police power involved was that derived solely from the City's home rule authority; and, the exercise of the police power there was fixing prices for the local cable T.V. system. Interestingly, the cable T.V. operator in *Manor Vail* was a wholly-owned subsidiary of TCI and argued that the city's price fixing ordinance "represents the legitimate and valid exercise by the town of its power to grant a franchise to [TCI]" and that fixing rates for cable T.V. is a reasonable "home-rule" regulation because cable T.V. is "a private business affected with the public interest." *See Manor Vail,* Answer of Community Television Investment, Inc. 3-4.

[17] Boulder began such regulation in 1964. The Town of Vail established cable T.V. rate schedules as early as 1968. *See Manor Vail, supra* n.16, 604 P.2d at 1170. The City of Greeley began regulating cable T.V. in 1968. (P. Br. Appendix BA-3). We understand that the brief, *amicus curiae,* of the Colorado Municipal League indicates that 85 Colorado municipalities presently regulate cable T.V. operations within their borders, several since the early 1960's.

> [L]ocal governments are inescapably involved in the process because cable makes use of streets and ways and because *local authorities are able to bring a special expertness* to such matters, for example, as how best to parcel large urban areas into cable districts.

37 Fed. Reg. 3252, 3276 (1972) (emphasis added). The FCC has concluded that franchising terms, operator qualifications, subscriber rates, districting and similar topics represented matters which are "*uniquely within the competence of local authorities.*" *Id.* (emphasis added).[18]

The Colorado Constitution itself states that, as to local matters, home rule city ordinances "shall supersede within the territorial limits . . . of said city . . . any law of the State in conflict therewith." COLO. CONST. art. XX, § 6. Thus, for example, a home rule city's zoning ordinance "aimed at establishing low-cost housing in a specific area within the city" is a local matter, subject only to the city's self-governing power:

> Any alleged conflict, then, between the ordinance in question and the provisions . . . of the Colorado statutes, as to which controls, is resolved in favor of the local ordinance.

Moore v. *City of Boulder,* 29 Colo. App. 248, 254, 484 P.2d 134, 137 (1971); *City of Colorado Springs* v. *Smartt,* ___ Colo. ___, 620 P.2d 1060, 1062 (1981).

> The General Assembly has power to legislate zoning regulations applicable to *statutory cities.* Where, however, the charter of a *home rule city* exercises the power delegated to it by Article XX, Section 6 [of the Colorado Constitution], as to matters of purely local concern, the legislature has no power.

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[18] *See also* 39 Fed. Reg. 14288, 14292 (1974). We understand that the brief, *amicus curiae,* filed by the Cable Television Information Center will also address the local nature of cable T.V.

Service Oil Co. v. *Rhodus,* 179 Colo. 335, 346, 500 P.2d 807, 812 (1972) (emphasis in original); *see Klemme* at 326. Like zoning and other local matters, the issuance of permits for cable T.V. services in a City's right-of-way affects peculiarly local interests.

Colorado's constitutional home rule system may well provide the broadest and strongest grant of self-government of all the 50 states. *Klemme* at 359-61. It has long been viewed as having "no counterpart in the constitutions of other states." *City and County of Denver* v. *Henry,* 95 Colo. 582, 586, 38 P.2d 895, 897 (1934).[19] In the instant action, the trial court characterized Colorado home rule as "rather unique". (March 6 Tr. 123).[20] The court of appeals also cautioned that "[i]t is a mistake to generalize about 'home rule' as it may be treated in opinions from different jurisdictions" (App. Pet. A-4) and relied upon the nature of Boulder's home rule powers in reaching its decision. (App. Pet. A-5 to A-6).

Whether unique or just unusual, Colorado's constitutional guarantee of home rule to Boulder clearly frames

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[19] Colorado's home rule provision is unique because of its source — the people of Colorado acting through the State Constitution — and its scope — authority to supersede the state legislature as to local matters. A detailed discussion of the differences among the home rule authorities of the various states is set forth in Respondent's Brief in Opposition to the petition at 24-25.

[20] THE COURT: If you get down to the ultimate source of the power, and governmental concepts, Boulder is exercising authority of the people of the state of Colorado in matters of local concern within Boulder, because the people of the state of Colorado exercising their ultimate sovereign power put Article 20 in the Constitution of this state. They are not operating under some delegated authority from the representatives in the general assembly. *They are operating on the basis of the ultimate sovereign authority of the people of the state. That's what Colorado's Article 20 is all about.*

(March 6 Tr. 125, *quoted at* App. Pet. A-5; emphasis added).

the issue before this Court: *Where the state constitution grants autonomy over local matters to a home rule city, does the City Council's valid exercise of those powers to enact an ordinance halting cable T.V. construction within the City limits for 90 days constitute an act of government which is beyond antitrust attack?*

B. Under *Parker* And *City of Lafayette*, The Home Rule City Ordinance Challenged Here Is Not Subject To Sherman Act Attack.

In *Parker* v. *Brown*, 317 U.S. 341 (1943), a California statute "restrict[ed] competition among the growers and maintain[ed] prices in the distribution of their commodities to packers." *Id.* at 346. The Court reversed an injunction of this plan, holding that:

> The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, *as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.*

317 U.S. at 352 (citations omitted; emphasis added).

The only distinction between the present case and *Parker* is that here the "act of government" is imposed by a home rule city rather than by the state legislature.[21] Under *Parker* and Colorado law, this is a distinction with-

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[21] Petitioner and the state *amici* apparently concede that a statewide cable T.V. regulation adopted by the state legislature would be immune from antitrust attack under *Parker*. Thus, this is not a situation where the government's interest in the challenged act is so remote that even a state program would not qualify under *Parker*. *E.g.*, Cantor v. Detroit Edison Co., 428 U.S. 579 (1976). Rather, Petitioner and the *amici* states contend that the *Parker* immunity ordinarily applicable dissolves solely because the regulation of local cable construction was adopted by the City's home rule municipal legislature.

out a difference. In Colorado, "home-rule cities, such as [Boulder], are constitutionally granted every power possessed by the General Assembly as to local and municipal matters. . . ." *Veterans of Foreign Wars, Post 4264* v. *City of Steamboat Springs,* 195 Colo. 44, 50, 575, P.2d 835, 840, *appeal dismissed,* 439 U.S. 809 (1978). Indeed, as to local matters regulated by a home rule city, the Colorado General Assembly is without power to act.[22] In this situation, there can be no doubt that Boulder's home rule ordinance governing its local cable T.V. permittee constitutes "an act of government" which is not subject to the Sherman Act under *Parker.*

In *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977), the Court held that the Arizona Supreme Court ban on attorney advertising was not subject to Sherman Act challenge:

> [T]he challenged restraint is the affirmative command of the Arizona Supreme Court under its Rules . . . That court is the ultimate body wielding the State's power over the practice of law . . . and, thus,

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[22] *Service Oil Co.* v. *Rhodus,* 179 Colo. at 346, 500 P.2d at 812. CCC's lengthy argument that home rule authority is not "exclusive" (P. Br. 28-30) is simply beside the point. The question is who has predominant authority where a state statute and a home rule city ordinance conflict over a local matter. CCC's "city-state" argument (P. Br. 25-27; A.G. Br. 27 n.35) is equally fallacious. When Colorado home rule first appeared, those who sought to avoid local regulation challenged the concept as an unrepublican form of government violative of the United States Constitution, article 4, § 4. This Court and the Colorado Supreme Court uniformly rejected the contention. City and County of Denver v. New York Trust Co., 229 U.S. 123, 141 (1913); People ex rel. Attorney General v. Curtice, 50 Colo. 503, 117 P. 357, *appeal dismissed sub nom.* Cassidy v. Colorado, 223 U.S. 707 (1911). It is solely in the context of rejecting these old "unrepublican government" claims that the Colorado courts have characterized home rule cities as not being "city-states."

> the restraint is "compelled by direction of the State acting as sovereign."

433 U.S. at 359-60 (citation omitted). So too, in the present case the City of Boulder "is the ultimate body wielding the State's power" on Boulder's local matters and, thus, "the restraint 'is compelled by direction of the State acting as sovereigr..'"

In three other cases, the Court faced attempts by private business concerns to shield their private anticompetitive conduct behind the governmental sovereignty of a state or its subdivision.[23] The present case is entirely different: here, the private business brings an antitrust action against the government itself challenging a unilaterally adopted ordinance.

The sole argument of the Petitioner (and the amici states) is that the ruling in City of Lafayette v. Louisiana Power & Light Co., *435 U.S. 389 (1978), compels this Court to reverse the decision of the court of appeals in the instant case.* As the following discussion demonstrates the decision of

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[23] In California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), private price fixers were denied immunity because California's wine trade regulation "simply authorizes price-setting and enforces the prices established by private parties." *Id.* at 105. In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), a unanimous Court held that attorney title search fees fixed by the bar association were not immune under *Parker* since the price fixing rule "is essentially a private anticompetitive activity." *Id.* at 792. In Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), the Court held that a tie-in of light bulb sales to electricity service by a private utility was not immune under *Parker* since "[n]o public officials or agencies are named as parties and there is no claim that any state action violated the antitrust laws." *Id.* at 591. In *Bates,* 433 U.S. at 361, the Court emphasized that "*Cantor* would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party."

the court of appeals is entirely consistent with *City of Lafayette* and satisfies the applicable tests enunciated in that decision.

In *City of Lafayette,* a city-owned and operated electric utility brought an antitrust action against its private competitor. The defendant's counterclaim alleging illegal tie-ins and other antitrust violations by the city was dismissed as immune under *Parker.* The court of appeals reversed and this Court affirmed, holding that the challenged activities of Lafayette in operating its electric utility were not immune from antitrust attack. A majority of the Court (Justices Brennan, Marshall, Powell and Stevens, with the Chief Justice concurring in part I) agreed with the Fifth Circuit's holding that *Parker* immunity would apply only if a City's actions "'are comprehended within the powers granted to it by the legislature.'" 435 U.S. at 394.

Mr. Justice Brennan's plurality opinion (Parts II and III in which Justices Marshall, Powell and Stevens joined) would go further and limit *Parker* immunity to acts which are "pursuant to state policy to displace competition with regulation or monopoly public service." 435 U.S. at 413.[24] The Chief Justice concurred in the judgment on the basis that *Parker* did not apply to municipal "business activity" which made the case "an ordinary dispute among competitors in the same market." *Id.* at 418, 419. Mr. Justice Stewart (joined by Justices White, Blackmun and Rehnquist) dissented on the basis that under *Parker,* the antitrust laws are equally inapplicable to the actions of the states or their political subdivisions. *Id.* at 426.[25]

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[24] Mr. Justice Marshall filed a brief concurrence in the plurality opinion. 435 U.S. at 417-18.

[25] Mr. Justice Blackmun filed a separate dissenting opinion registering his view that *Parker* immunity should not apply to cities "act-

Boulder's moratorium Ordinance qualifies for immunity under the tests set forth in City of Lafayette *by the majority, the plurality, the Chief Justice's concurrence, and the dissent.* Here the action complained of (a local construction moratorium) is plainly within the authority given the home rule City of Boulder, is contemplated by its constitutional grant of powers directly from the people and thus meets the majority's test.

Similarly, although the plurality reasoned that a city's actions would qualify under *Parker* only if they were taken "pursuant to a state policy to displace competition with regulation," 435 U.S. at 413, the plurality further emphasized that:

> *This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a Parker defense to an antitrust suit.* . . . [W]e agree with the [Fifth Circuit] Court of Appeals that an adequate state mandate for anticompetitive activities of cities . . . exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of."

Id. at 415 (emphasis added; citation omitted). Thus, "it is not necessary to point to an express statutory mandate for each act"; it is sufficient if the municipal acts "are comprehended within the powers granted to it by the legislature." *Id.* at 393-94. No talismanic legislative words are required and the "'district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent.'" *Id.* at 394.

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ing in concert with private parties" and questioning the appropriateness of the treble damages remedy when cities are defendants. 435 U.S. at 441-43.

Boulder's Ordinance is fully consistent with the *City of Lafayette* plurality test.[26] Here the requisite state policy is derived from the Colorado Constitution's grant to Boulder of home rule power over matters of local concern.

The exercise of such powers of home rule is neither new to our system of government nor unanticipated by this Court. In applying the one man, one vote principle to local government, for example, the Court pointed out that:

> While state legislatures exercise extensive power over their constituents and over the various units of local government, the States universally leave much policy and decisionmaking to their governmental subdivisions. Legislators enact many laws but do not attempt to reach those countless matters of local concern necessarily left wholly or partly to those who govern at the local level. What is more, in providing for the governments of their cities, counties, towns, and districts, *the States characteristically provide for representative government — for decisionmaking at the local level by representatives elected by the people. And, not infrequently, the delegation of power to local units is contained in constitutional provisions for local home rule which are immune from legislative interference.*

Avery v. *Midland County*, 390 U.S. 474, 481 (1968) (emphasis added); *see also, District of Columbia* v. *John R. Thompson Co., Inc.*, 346 U.S. 100, 108-09 (1953).

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[26] The Third and Fifth Circuits have held that express state authorization is unnecessary since the authority for the actions of a state instrumentality "'may be inferred from the nature of the powers and duties given to a particular government entity.'" Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530, 550 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979); Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706, 717 (3d Cir.), *cert. denied*, 439 U.S. 966 (1978).

The vitality of this home rule theory of government lies in its underlying premise that — to paraphrase the plurality in *City of Lafayette* — the locally autonomous, representative government does not need "to point to a specific, detailed legislative authorization." 435 U.S. at 415. Indeed, such specific and detailed legislative directives are inherently inconsistent with the theory of home rule. Thus, under the test of the *City of Lafayette* plurality, it is enough that Boulder's cable T.V. moratorium Ordinance is "comprehended" or "contemplated" by the powers and authorities which the Colorado Constitution confers upon it.

Moreover, the grant of legislative authority over local matters necessarily contemplates that legislative regulations may restrain trade to accomplish legitimate regulatory goals. See discussion *infra* at 34-35. The principle is amply demonstrated by the General Assembly which, like the City of Boulder, is endowed with legislative powers by the state constitution. COLO. CONST. art. V, § 1. However, nowhere does the constitution specify that in exercising legislative powers, the General Assembly may restrain trade. Yet it is beyond challenge that the General Assembly's regulatory statutes are immune from antitrust attack. "[I]f an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed." *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117, 133 (1978). The contemplation of this kind of *legislative anticompetitive act* is inherent in the grant of the legislative authority — whether to the General Assembly over state matters or to the home rule City Council over local matters.[27]

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[27] For example, the General Assembly has strictly regulated the market for child labor through a variety of statutory minimum ages and corresponding lawful jobs for minors. COLO. REV. STAT. §§ 8-12-

The Chief Justice's concurring opinion in *City of Lafayette* makes clear that he declined to apply *Parker* because the cities there were " 'engaging in what is clearly a business activity' " (435 U.S. at 418) which presented "an ordinary dispute among competitors in the same market." *Id.* at 419. The Chief Justice reasoned that although a city's governmental acts are not reachable under the antitrust laws, the ordinary commercial activities of its "entrepreneurial personality" (*id.* at 422) are subject to antitrust scrutiny unless compelled by the state. Since the Ordinance challenged here was a legislative enactment within the City's home rule powers, rather than the operation of a business enterprise, Boulder's Ordinance would apparently satisfy the Chief Justice's test.

In any event, the court of appeals properly distinguished the present case from *City of Lafayette* on the basis of important factual differences. Even the plurality opinion focused on the potential impact of cities' "economic choices," made "in the conduct of their *business affairs,*" as a "*business enterprise*" and "*acting as providers of services.*" *Id.* at 403, 408 (emphasis added). Unlike Lafayette, Boulder was not acting as an "owner or provider of services" (*id.* at 408), Boulder's dispute with CCC is not simply "one among competitors in the same market" (*id.* at 419) and Boulder was not engaged in its own "business enterprise" (*id.* at 408).[28] The court of ap-

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101 to 8-12-117 (1973). Yet, there is no express constitutional directive authorizing this "specific *kind* of action in a *particular* area." (P. Br. 35).

[28] The Tenth Circuit characterized the Louisiana cities' actions as "proprietary" to distinguish them from Boulder's governmental acts. (App. Pet. A-6 and A-7). This distinction is used by the Chief Justice in his concurring opinion in *City of Lafayette:* "I use the term

peals properly found that "[t]he City is not in the television business in any way" (App. Pet. A-6 to A-7) and that, accordingly, *City of Lafayette* was distinguishable from Boulder's situation. (App. Pet. A-8).

More important, however, than the differences in the kind of municipal actions at issue is the fact that Petitioner's demand for specific, detailed statutory authorization in each case would be particularly unworkable in the context of Colorado home rule because it is based on two false premises.

First, the Petitioner's rule would rely exclusively on the state legislature as the sole policymaker in the state. Whatever relevance this approach may have in other contexts, it has no relevance in the case of Colorado home rule cities where the state constitution guarantees local autonomy. *How can the state legislature's "contemplation" be determinative when the authority for the challenged ordinance did not originate with the legislature's grant, but with an amendment to the state constitution adopted by referendum? How can the state legislature's "contemplation" be determinative when the constitution expressly prohibits the*

'proprietary' only to focus attention on the fact that all of the parties are in a competitive relationship. . . ." 435 U.S. at 422 n.3. Petitioner's hornbook and state law definitions (P. Br. 36 n.21) drawn from other contexts are irrelevant; as used by the Tenth Circuit the term has reference to a municipality's business activities in competition with private enterprises. Moreover, the mere payment of a 2% fee to the City (J.A. 7) does not make the City's action proprietary. *See* Parker v. Brown, 317 U.S. at 348 (where raisin growers paid $2.50 per ton to the state). Furthermore, none of the challenged City actions alter or affect this 17 year old fee arrangement. (See Ordinance No. 4515 at 3; this part of the ordinance was omitted from the copy of the ordinance reprinted in the J.A. by petitioner; see appendix to this brief at 1a).

state legislature from overriding the will of the local people "in both local and municipal matters?"

Second, the proposed rule is premised on the notion that government at the state level establishes "state direction" and "an actual *state* decision" in each case. (P. Br. 34-35; A.G. Br. 21). Here again, whatever relevance this approach may have in other contexts, it has none in the case of Colorado home rule cities where the "direction" and the "decision" on local matters arises at the local level pursuant to "the full right of self-government."

It is simply not enough to say that all cities need do is abide by the antitrust laws. The mere need to defend one's self when charged with violating the antitrust laws, with the unavoidable costs in time and money, may be too burdensome for financially strapped cities to undertake. Moreover, given established Sherman Act law, many legitimate governmental activities could be deemed to be anticompetitive. (*See* discussion *infra* at 34-35). Thus, the application of *City of Lafayette* to require a specific state directive in each case would foreclose home rule cities from acting on local matters without going back to the General Assembly for an express direction on each particular matter.

The difference of opinion on this point between the *amici* states and the self-governing cities such as Boulder is not new. At stake is the same governmental power over local matters which in 1902 the people of Colorado wrested from the state legislature and firmly granted to local, home rule governments by constitutional amendment. Nor is the talk (P. Br. 44-45; A.G. Br. 29) of elevating the "parochial interests" of home rule cities over the state legislature new. What the Colorado Attorney General seeks to do here is to reclaim in federal court — under the guise of the antitrust laws — a degree of the

General Assembly's power over home rule affairs which it lost in the political process by constitutional referendum eighty years ago.

II. TO THE EXTENT *CITY OF LAFAYETTE* MAY BE CONSTRUED AS SUBJECTING BOULDER'S HOME RULE ORDINANCE TO ANTITRUST ATTACK, IT SHOULD BE CLARIFIED IN KEEPING WITH THE PURPOSE OF THE SHERMAN ACT AND COUNTERVAILING PRINCIPLES OF FEDERALISM.

The decision in *City of Lafayette* is the only instance in which this Court has held that unilateral actions of a government could subject the government itself to liability under the Sherman Act. To the extent *City of Lafayette* may be interpreted, as Petitioner here urges (P. Br. 35), as subjecting all municipal ordinances to antitrust scrutiny absent an explicit state legislative mandate, it must be clarified so as to obviate the need for such particularized authorization in the case of Colorado home rule cities. The test on which Petitioner and the state *amici* rely is inconsistent with the plain legislative intent of the Sherman Act and with longstanding principles of Federalism.

A. The Sherman Act Was Not Intended To Apply To Legislative Acts Of Local Governments And Its Application To Such Acts Will Have Serious Adverse Consequences For Cities And For The Federal Courts.

The legislative history of the Sherman Act and the decisions of this Court demonstrate that Congress did not intend to bring *acts of government* under federal antitrust scrutiny. Moreover, antitrust scrutiny of governmental acts, particularly in the area of cable T.V., will unnecessarily handicap legitimate governmental regulation, generate bad antitrust law, and clog the federal courts.

The Sherman Act was adopted by Congress on July 2, 1890, in response to the public demand to curb "these great trusts, these great corporations, these large moneyed institutions," 21 CONG. REC. 2562 (1890) (remarks of Sen. Teller), which had steadily increased their control over prices and competition in the markets for many vital commodities and services.[29] The legislative history of the Sherman Act demonstrates clearly that the Act was directed at abuses of private business and private capital. *E.g.*, 21 CONG. REC. 2457, 2459, 2460, 2569 (1890) (remarks of Sen. Sherman); *id.* at 2647 (remarks of Sen. Vance); *id.* at 2726 (remarks of Sen. Edmunds); *id.* at 3147 (remarks of Sen. George). Congress was concerned with a problem of immense scope: the vesting of control over "the production, transportation, and sale of . . . the necessaries of life" in a few individuals and private corporations. *Id.* at 2457. It was reported to the House that the bill's "*only objective was the control of trusts. . . .*" 21 CONG. REC. 5950 (1890) (emphasis added).

Nowhere in the extensive debates is there a hint that anyone in the 51st Congress even considered the possibility, much less intended, that the legislation be-

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[29] Senator James K. Jones of Arkansas voiced a common sentiment and concern:

> The growth of these commercial monsters called trusts in the last few years has become appalling. For a long while they were limited in numbers and applied to but a few articles. . . .
>
> Now, however, having been allowed to grow and fatten upon the public, their success is an example of evil that has excited the greed and conscienceless rapacity of commercial sharks until in schools they are to be found now in every branch of trade, preying upon every industry, and by their unholy combinations robbing their victims, the general public, in defiance of every principle of law or morals.

20 CONG. REC. 1457 (1889). *See also* H. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 72-96 (1955).

fore them would be used to effect federal regulation of legitimate local governmental actions. Nor has any subsequent Congress, in the passage or consideration of antitrust legislation, indicated an intent to apply the Sherman Act to governmental acts of a state or its subdivisions.[30]

In keeping with the Sherman Act's plain purpose, this Court has interpreted the Act as a remedy for the abuses of *private businesses* and not as subjecting governmental activities to the antitrust laws. From its earliest antitrust decisions, the Court viewed the Act as directed at private business combinations.

> [The debates on the Sherman Act] conclusively show . . . that the main cause which led to the legislation was the thought that it was required by the economic condition of the times; that is, the vast accumulation of wealth in the hands of corporations and individuals. . . .

Standard Oil Co. v. *United States,* 221 U.S. 1, 50 (1911); *see also Northern Securities Co.* v. *United States,* 193 U.S. 197, 352 (1904) ("interests of private persons and corporations cannot be made paramount to the interests of the general public"); *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 493 (1940) (antitrust laws concerned with restraints "in business and commercial transactions"); *Texas Industries, Inc.* v. *Radcliffe Materials, Inc.,* 49 U.S.L.W. 4537, 4541 (U.S. May 26, 1981) ("treble-damages action remains a private suit involving the rights and obligations of private parties").

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[30] *See* H. THORELLI, *supra* n.29, at 500-56; HOUSE SELECT COMM. ON SMALL BUSINESS, 89th Cong., 2d Sess., CONGRESS AND THE MONOPOLY PROBLEM 153-434 (Comm. Print 1966) (reviewing all antitrust-related legislation between 1890 and 1966).

Early in the Sherman Act's history the Court rejected a claim that a state's practice of licensing harbor pilots, through its authorized state agents, violated the Sherman Act, holding that the argument:

> . . . is also but *a denial of the authority of the state to regulate,* since, if the state has the power to regulate, and in so doing to appoint and commission those who are to perform pilotage services, it must follow that *no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the state are alone allowed to perform the duties devolving upon them by law.*

Olsen v. *Smith,* 195 U.S. 332, 345 (1904) (emphasis added).

In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961), the Court held that private efforts to induce a state legislature to take anticompetitive acts were beyond antitrust attack. *Id.* at 139. A contrary ruling, the Court reasoned, would deny the government access to public comment, thus imputing to the Sherman Act "a purpose to regulate, not business activity, but political activity, *a purpose which would have no basis whatever in the legislative history of that Act.*" *Id.* at 137 (emphasis added). Cutting government off from the people would "substantially impair the power of government to take actions through its legislature and executive that *operate to restrain trade.*" *Id.* (emphasis added).

This Court and other federal courts have applied the *Noerr* doctrine with equal force to petitions directed to state agencies and local governmental bodies. *E.g., California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 510-11 (1972) (state agencies); *Mark Aero, Inc.* v. *Trans World Airlines, Inc.,* 580 F.2d 288, 296 (8th Cir. 1978) (city councils); *In re Airport Car Rental Litigation,*

1981-1 TRADE REG. REP. (CCH) ¶ 63,983 (N.D. Cal. 1981) (city airport authorities).

In *Noerr*, the Court recognized that government must have access to public opinion in order to function responsibly. If the private petitioner urging anticompetitive action is shielded from the antitrust laws, must not the local government, in performing its legislative function, also be protected from the rigors of antitrust litigation and potential treble damages? *Otherwise, government will cease to listen to its constituents for fear of the cost of being responsive.*

Subjecting local governments to the antitrust laws would also present substantive antitrust problems. In *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 691-92 (1978), the Court held that "[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition . . .; it is not to decide whether a policy favoring competition is in the public interest. . . ." The Rule thus requires a weighing of competitive effects and *a disregard of governmental policy objectives* which cannot be measured on the Rule's competitive scale.

Governments as a whole, and local governments in particular, often pursue governmental policy objectives which are unrelated to promoting competition and thus cannot be balanced under the Rule of Reason.[31] The child labor laws certainly restrain trade and do little to promote competition for child laborers. Similarly, restrictions on

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[31] The instant case is one of the rare instances in which a local government's actions would be judged reasonable under the Rule of Reason. Boulder's principal motivation in adopting the moratorium Ordinance, *supra* at 5, was procompetitive. The moratorium effected only a "temporary and limited loss of competition," outweighed in a proper Rule of Reason analysis by the prospective long term benefit

the hours during which taverns may serve liquor plainly restrain trade and do not promote competition in the liquor sales market. Likewise, health, safety, fire, environmental and other forms of local governmental regulation may impose very significant trade restraints in furtherance of legitimate social objectives which have nothing whatever to do with stimulating competition. Examples of such matters covered by municipal regulations are the fixing of prices for monopoly cable T.V. services[32]; land use planning pursuant to zoning ordinances[33]; limitations on hours of operations of business[34]; refuse disposal and other environmental controls[35]; and low-cost housing.[36]

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of opening a market controlled by a *de facto* monopolist. *National Society of Professional Engineers*, 435 U.S. at 689 & n.12. Moreover, the trial court's finding of a "conspiracy" on the basis of a faulty analogy to Sahm v. V-1 Oil Co., 402 F.2d 69 (10th Cir. 1968) and like cases was an error of law. The analogy is inapplicable here because (1) there is no underlying illegal contract, (2) the challenged activity was not an attempt to enforce such a contract, and (3) CCC never complied with the moratorium. The court of appeals could have reversed on the basis of these errors of law alone. Its decision to reach the "jurisdictional" question of whether the Sherman Act applied to Boulder is a recognition of the importance of the issue and of the judicial resources conserved by avoiding lengthy Rule of Reason trials.

[32] *E.g., Manor Vail, supra* at 17 n.16, 604 P.2d at 1171-72.

[33] *E.g.*, BOULDER, COLO., CODE §§ 37-101 through -1211 (1965 rev. ed.).

[34] *E.g.*, BOULDER, COLO., CODE § 3-210 (1965 rev. ed.) (limitation on hours of operation for taverns).

[35] Glenwillow Landfill, Inc. v. City of Akron, 485 F. Supp. 671 (N.D. Ohio 1979), *appeal docketed sub nom.* Hybud Equip. Corp. v. City of Akron, No. 80-3121 (6th Cir. Jan. 14, 1980).

[36] *See* Strauss & Stegman, *Moderate-Cost Housing After* Lafayette: *A Proposal*, 11 URB. LAW. 209 (1979) (municipal regulations to control resale price of homes for low-income housing projects).

These types of local regulation have three things in common. First, they unquestionably serve legitimate governmental interests in matters of local concern.[37] Second, at least in Colorado, there is no specific state statutory mandate under which home rule cities could enact many of these regulations and thus qualify for immunity under the *City of Lafayette* test proposed by Petitioner and the *amici* states. Third, many of these municipal restrictions are incorporated into permits, franchises and licenses which a trial court might determine constitute a "contract, combination . . . or conspiracy in restraint of trade."

As a result, the reversal of the court of appeals' ruling in this case would:

1. *Turn every unhappy or unsuccessful applicant for a municipal permit, franchise or license into an antitrust plaintiff with full access to the federal courts, to extensive pre-trial discovery, and to a jury trial.* Considering the fact that each local government issues and denies thousands of these permits, franchises, and licenses each year, and that there are roughly "40,000 local government units nationwide" (A.G. Br. 8), this development alone could clog the federal courts for years.[38]

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[37] It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Berman v. Parker, 348 U.S. 26, 32-33 (1954), *quoted in* Village of Belle Terre v. Boraas, 416 U.S. 1, 6 (1974).

[38] In a speech made by a deputy assistant attorney general from the Antitrust Division, municipal officials were warned that a "non-exhaustive" list of areas of municipal activity which might be open to antitrust challenges included: (1) any regulatory activity, including occupational licensing and regulation; (2) the operation of sports arenas or convention centers; (3) the provision of water, electric, and other utility services; (4) garbage collection; (5) transit systems, including taxis; (6) public health

2. *Force federal courts who strictly apply the Sherman Act to enjoin legitimate local governmental regulation.* Many local governmental actions will serve legitimate, but anticompetitive, public interests which are not cognizable under the Rule of Reason. Similarly, at least in the context of home rule cities, many such actions will be unsupported by any specific state legislative mandate. Thus, in a strict application of the antitrust laws, the federal courts will be required to enjoin admittedly desirable local regulation.[39]

3. *Force federal courts who are unwilling strictly to apply the Sherman Act to create new and unsound antitrust "rubrics" in order to avoid the necessity of enjoining desirable local regulation.*[40]

4. *Subject local governments — which are ill equipped to handle complex antitrust litigation — to very substantial litigation costs for their own defense.* Even

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services; (7) airports; (8) parking lots; (9) procurement practices generally; and (10) zoning. Remarks of Joe Simms, 72d Annual Conference of Municipal Finance Officers Association (May 15, 1978).

Note, *The Application of Antitrust Laws to Municipal Activities*, 79 COLUM. L. REV. 518, 524 n.54 (1979).

[39] Moreover, subjecting cities to judicial antitrust review would effectively turn back the clock to the era of substantive due process, when every legislative act of government was subjected to endless economic "hair-splitting" by the federal courts. *See* Verkuil, *State Action, Due Process and Antitrust: Reflections on* Parker v. Brown, 75 COLUM. L. REV. 328 (1975); Handler, *Twenty-Fourth Annual Antitrust Review*, 72 COLUM. L. REV. 1, 4-18 (1972).

[40] Consider the myriad exceptions and refinements that the lower courts developed in order to avoid application of the rule of *per se* illegality for vertical non-price restraints between the time the rule was set forth in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), and then rescinded in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). *See id.* at 48 n.14; Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1, 3 n.10 (1977).

> specious claims will be difficult to avoid litigating, since "summary procedures should be used sparingly" in antitrust cases.[41] Of course, losing a case would also subject a city — and its taxpayers — to the additional liability for the plaintiff's attorneys' fees and potentially enormous treble damages.

The impact of such a ruling in the field of cable T.V. alone would be significant. Because of the high stakes involved in the current "boom" in franchising of cable markets, the effort of a disappointed applicant in seeking injunctive relief or damages under the antitrust laws is quite worthwhile, even if it serves merely as a bargaining tool. Is every city that issues a cable permit to be required to face such antitrust litigation from the rejected suitors? Is every city that granted a cable permit 15 or 20 years ago, as Boulder did, to be saddled with the same monopoly operator and the same permit because legitimate governmental acts to modify the permit are subject to Sherman Act attack?[42]

The Petitioner and the *amici* states argue that the application of *Parker* to Boulder's cable T.V. Ordinance will shatter "'our national economic policy'" (A.G. Br. 2, 11, 29) and overturn our "free market goals" (P. Br. 20,

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[41] Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962).

[42] Remedies for economic displacement caused by governmental acts should be found, if at all, in a source other than the Sherman Act. For example, unauthorized actions by municipal governments or their agents may be attacked as *ultra vires*. 17 E. McQUILLIN, MUNICIPAL CORPORATIONS §§ 49.18, 49.29 (3d ed. 1979). Criminal actions may, of course, be prosecuted under state (COLO. REV. STAT. § 18-5-401 (1973)) and federal (18 U.S.C. § 1341 (1976) (mail fraud); 18 U.S.C. § 1962 (1976) (RICO)) criminal laws. *See, e.g.*, United States v. Mandel, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980).

43-44) by elevating "parochial interests at the expense of wider concerns." (P. Br. 20, 44-45; A.G. Br. 2, 11, 29). These broad claims are in error on a number of grounds. The free market concept has always countenanced an important role for governmental action. Adam Smith himself affirmed the role of government in maintaining public works and regulating certain monopolistic businesses. 2 A. SMITH, THE WEALTH OF NATIONS 184-85, 214-49 (1904). Moreover, as the foregoing discussion demonstrates, much necessary and desirable municipal action simply cannot pass the relevant Sherman Act tests. In the ninety years since the Sherman Act was adopted it was never thought to apply to cities' legislative acts. Surely our "free market goals" will not be destroyed if the legislative acts of home rule cities remain insulated by *Parker.*

It is ironic that the states would raise this argument since they would be the first to insist upon the right to elevate their 50 individual interests "to a position of preeminence over the national economic policy favoring competition which is embodied in the antitrust laws." (A.G. Br. 29). In addition, if a state legislature believes that exempting home rule cities from the Sherman Act would disrupt some state-wide policy (A.G. Br. 11), its remedy is in the political forum. The Constitution of Colorado can be amended by referendum, as the people did in 1902.

B. The Principles Of Federalism As Embodied In The United States Constitution And In The Decisions Of This Court Preclude The Application Of The Sherman Act To The City Ordinance Challenged Here.

Significant Federalism concerns arise when a federal statute under the commerce clause is applied so as to interfere with the most fundamental attribute of state

sovereignty — the authority of the state to determine the structure of its own government. The history of the Constitution shows that the Framers intended our "dual system of government" to ensure the continued existence of an enclave in which local, representative democracy could function. Moreover, this Court has expressly recognized that there are Federalism limits to Congressional commerce clause power to regulate matters which affect the integral functions of state and municipal governments.

The freedom of the state to allocate power and determine its governmental structure is one of the undisputed "*attributes of sovereignty*" protected by Federalism.[43] The first organic act of a sovereign government is to organize its decisionmaking apparatus; if the government cannot determine who may exercise the power and in what manner, it has no sovereignty. This Court has always recognized the state's right to allocate its sovereign power among its various subdivisions.[44] Thus, Colorado's con-

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[43] "Whether territory shall be governed for local purposes by a county, a city or a township organization is one of the most usual and ordinary objects of state legislation." Kelly v. City of Pittsburgh, 104 U.S. 78, 81 (1881).

[44] In Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978), for example, the Court declined to overturn an Alabama statute subjecting citizens of an unincorporated association to the police and sanitary regulations of an adjoining city. "[A] State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power." *Id.* at 71. Similarly, in Sailors v. Board of Education, 387 U.S. 105 (1967), the Court accorded deference to a state decision to appoint rather than elect the members of a county school board. In so ruling, the Court reiterated the principle that "[s]ave and unless the state, county and municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs." *Id.* at 110; *see also* Lockport v. Citizens for Community Action, 430 U.S. 259 (1977); Hunter v. City of Pittsburgh, 207 U.S. 161 (1907); Williams v. Eggleston, 170 U.S. 304 (1898); Kelly v. City of Pittsburgh, 104 U.S. 78 (1881).

stitutional choice to allocate legislative power over local matters to home rule cities is entitled to deference.

Moreover, local governments have always been an integral part of the American political system. In the years prior to the American Revolution, local governments allowed the colonists to engage in self-rule without interference from England:

> The preponderance of political power was exercised in towns, parishes, counties, and boroughs, and . . . these entities were even more independent of the colony than the colony was of the Crown. Self-government was doubly the rule in colonial America.[45]

Following the Revolution and the adoption of the Constitution, it remained clear that the Framers intended local governments to share in the sovereignty reserved to the states. As Madison stated the point:

> Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the governments of the individual States, *that particular municipal establishments, might enjoy a certain extent of power and be arrayed with certain dignities and attributes of sovereignty?*

THE FEDERALIST No. 45 at 289 (Mentor ed. 1961). These principles of Federalism were embodied in the system

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[45] C. ROSSITER, SEEDTIME OF THE REPUBLIC at 16 (1953).

> [L]ocal governments throughout the colonies operated with substantial economy and popular control. . . . [T]hese governments served as excellent training grounds for self-government, particularly in New England, where the town meeting . . . prevailed.

POLITICS AND GOVERNMENT IN THE UNITED STATES 49 (A. Westin ed. 1965); *see also* C. BRIDENBAUGH, CITIES IN REVOLT: URBAN LIFE IN AMERICA, 1743-1777 (1955).

established by the Constitution and were codified in the tenth amendment. II J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1907 (3d ed. 1858).

In the 1800's de Tocqueville found New England towns exercising broad local autonomy. See discussion *supra* at 12. And, municipal governments continued to exercise the "attributes of sovereignty" of which Madison spoke in dealing with uniquely local, urban problems such as "[l]ighting, fire protection, the care of the streets, crime prevention, sewage disposal, water, community health [and] marketing facilities."[46]

Furthermore, throughout its review of municipal legislation, the Court has recognized that the principles of Federalism require deference to local as well as state governmental action. In determining whether federal statutes under the commerce clause preempted a conflicting city ordinance, for example, the Court has given municipal acts and state acts equal deference. *See Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440 (1960) (federal ship licensing statute did not preempt City of Detroit smoke abatement ordinance). The Court has also treated cities and states equally for a variety of other purposes.[47]

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[46] A. Schlesinger, *A Panoramic View,* in THE CITY IN AMERICAN LIFE 17 (P. Kramer ed. 1970).

[47] City of New Orleans v. Dukes, 427 U.S. 297, 301 (1976) ("A municipal ordinance is a 'state statute' for purposes of [the Court's jurisdiction]"); Sup. Ct. R. 36.4 (treats states and their political subdivisions equally for purposes of filing briefs *amicus curiae*); Waller v. Florida, 397 U.S. 387, 391 (1970) (double jeopardy clause); Avery v. Midland County, 390 U.S. 474, 480 (1968) (state action under the fourteenth amendment); City of Trenton v. New Jersey, 262 U.S. 182 (1923) (impairment of contract clause).

These same principles have recently been applied to bar federal commerce clause encroachment on legitimate city functions. In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Court held that, to the extent federal wage and hour laws adopted under the commerce clause operate to displace the freedom of cities and states "to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3." *Id.* at 852 (footnote omitted). The Court's decision was grounded in the principles which underlie "our federal system of government" (*id.* at 842, 844, 852). Moreover, the Court eschewed the notion that Federalism's "dual system" gave deference to states only and not to their political subdivisions, pointing out that:

> As the denomination "political subdivision" implies, the local government units which Congress sought to bring within the Act derive their authority and power from their respective States. Interference with integral governmental services provided by such subordinate arms of a state government is therefore beyond the reach of congressional power under the Commerce Clause *just as if such services were provided by the State itself.*

Id. at 855 n.20 (emphasis added).

Thus, *National League of Cities* stands for two propositions relevant to the instant case: First, it rekindled an awareness that the principles of Federalism may, in the appropriate case, limit the reach of federal statutes under the commerce clause. Second, it recognized that these principles accord a measure of deference to cities as well as states.[48]

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[48] In Hodel v. Virginia Surface Mining & Recl. Ass'n, No. 79-1538, slip op. at 19-22 (U.S. June 15, 1981), the Court clarified the prerequisites for application of *National League of Cities* principles:

> First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must

In *National League of Cities,* federal wage and hour regulations as applied to cities were deemed to come so close to the essential "freedom to structure integral operations" of local governments, that they touched the limit of Congressional authority under the principles of Federalism. In the present case, the application of the Sherman Act to Boulder's cable T.V. Ordinance presents the opportunity for similar encroachment in two respects.[49]

First, were the Court to interpret the Sherman Act as applying to Boulder's Ordinance because the state legislature issued no explicit mandate for the particular challenged act, the Sherman Act would intrude on the state's "freedom to structure integral operations." Any antitrust rule which forced the City to abandon its traditional local autonomy in order to obtain the specific authorization of the state legislature would interfere with the Colorado Constitution's allocation of legislative authority over local matters to home rule cities.

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address matters that are indisputably "attributes of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions."

Slip op. at 21 (footnote and citations omitted). Based on this analysis, Boulder's ordinance should not be subject to federal antitrust law because the "challenged statute" — the Sherman Act — (1) directly regulates the governmental body, (2) in the exercise of a central "attribute of sovereignty" — the performance of its legislative powers, and (3) on a matter (permits for commercial use of the public right-of-way) which plainly qualifies as an integral operation in an area of traditional functions.

[49] In *City of Lafayette,* opinions in which five members of the Court joined expressly referred to *National League of Cities* as demonstrating a potential constitutional limitation on the reach of the Sherman Act over local governmental functions. *See* 435 U.S. at 423-24 (Burger, C.J., concurring); *id.* at 430 (Stewart, White, Blackmun and Rehnquist, JJ., dissenting).

Second, if the Court were to conclude that the City is not shielded by *Parker,* the substantive application of the Sherman Act to Boulder's Ordinance amending its own permit raises comparable problems. The act of the local legislative authority (the City Council) in deciding to issue, deny or amend City permits is itself an integral and traditional governmental function. 9 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 26.01a (3d ed. 1979). If such activities are to be routinely scrutinized under the Sherman Act, then one of the central attributes of sovereignty which is necessary to maintain a "separate and independent existence" (*National League of Cities,* 426 U.S. at 846, 851) will be seriously eroded.

CONCLUSION

The Petitioner and the *amici* states do not object to the application of the *Parker* doctrine to shield state regulation of cable T.V. of the type at issue here; they disagree only with the application of *Parker* to such regulation by a home rule city where the state has not attempted to legislate on the subject. On Petitioner's theory, the City of Boulder cannot lawfully stop its own permittee from digging up the City's right-of-way for 90 days because Boulder's moratorium Ordinance was not expressly authorized by the state legislature.

The fact that Colorado's Constitution allocated the state's legislative power over local matters to home rule cities does not diminish the applicability of *Parker.* In *City of Lafayette* the plurality anticipated such a situation when it concluded that although the city's acts must be "authorized or directed" by the state (435 U.S. at 414, 416, 417), it is not necessary that the city "point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit." (435 U.S. at 415). Colorado's constitutional grant of home rule power satisfies this test.

To the extent *City of Lafayette* may be construed as requiring a specific, detailed authorization from the state legislature for each home rule municipal act, it must be clarified to prevent that construction. Such a broad application of the antitrust laws would be inconsistent with the intent of the Sherman Act and with the principles of Federalism on which our system of government is based. For these reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

The following paragraph of Boulder City Ordinance No. 4515 (July 22, 1980) was omitted in reprinting the ordinance in the Joint Appendix:

> WHEREAS, in order to avoid any assertion that the City is acting in a proprietary capacity in undertaking what the City Council deems to be the essential governmental objective of districting the City, the City will set the franchise fee for any new cable communications company granted a permit in the City at the same level as that paid by the grantee, through the expiration of the grantee's permit in 1984; and

The paragraph should have appeared between the third and fourth paragraphs at J.A. 71.